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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 911 [redacted] 20

UNITED FEDERAL WORKERS OF AMERICA (C.I.O), ET AL.,

Appellants,

vs.

HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN, AND ARTHUR S. FLEMING

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

LEE PRESSMAN,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 24007

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.), ET AL.,

Plaintiffs,

vs.

HARRY B. MITCHELL, ET AL.,

Defendants.

STATEMENT AS TO JURISDICTION

(Filed Oct. 26, 1944, Charles E. Stewart, Clerk)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, United Federal Workers of America (C.I.O.), Patrick T. Fagan, Harry V. Winegar, Jack M. Elkin, Rudolph Hinden, George P. Poole, Olivia Israeli Abelson, Joseph D. Phillips, Charles G. Shane, Albert J. Rieck, Richard Weber, L. E. Tempest and Margery Mitchell, plaintiffs in the above-entitled cause, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the judgment of the District Court.

This is an action brought by plaintiffs in the District Court of the United States for the District of Columbia, to enjoin defendants, who are members of, and constitute, the United States Civil Service Commission, from enforcing the

provisions of the second sentence of Section 9 (a) of the Hatch Act of August 2, 1939, as amended, 18 U. S. C. Section 61 h (a); 53 Stat. 1148, 54 Stat. 767, 56 Stat. 181, and to secure declaratory judgment of the invalidity of these provisions of law on the ground that they are repugnant to the Constitution of the United States. A statutory three-judge court was convened pursuant to the provisions of Section 380 (a) of Title 28 U. S. C. 50 Stat. 751. The statutory court on September 26, 1944, entered judgment dismissing the complaint on the merits, holding that the statute challenged was valid and not repugnant to the Constitution.

A. Statutory Provisions On Which Jurisdiction Rests

The statutory provisions which confer jurisdiction upon the Supreme Court to review the judgment are:

Section 380 (a) of Title 28 U. S. C., 50 Stat. 751, which reads as follows:

> "No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit

judge, as the case may be, to designate immediately two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court, making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible times and

shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

B. The Statute of the United States Involved in the Action

The validity of the second sentence of Section 9 (a) of the Hatch Act of August 2, 1939, as amended, 18 U. S. C. Section 61 (a), 53 Stat. 1148, 54 Stat. 767, 56 Stat. 181, is challenged in this action on the ground that it is repugnant to the Constitution of the United States. Section 9, in its entirety, reads as follows:

(a) "It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purpose of this section the term 'officer' or 'employee' shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign

powers or in the Nation-wide administration of Federal laws.

(b) "Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person."

Also pertinent to this section is Section 15 of the Hatch Act of July 19, 1940, 18 U. S. C. Section 61 (c) which reads as follows:

"The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns."

The interpretations of the Civil Service Commission incorporated into the second sentence of Section 9 (a) of the Hatch Act by Section 15 thereof are set out in Civil Service Commission Form 1236. A copy of the most recent edition of that Form is attached as Exhibit A.

C. Dates of Judgment and Petition for Appeal

The date of the final judgment of the District Court here sought to be reviewed is September 26, 1944.

Petition for allowance of appeal was presented on October 25, 1944.

D. Substantial Nature of the Question Presented

This is an action instituted by the United Federal Workers of America (CIO), an unincorporated labor union composed of employees of the Federal Government, on behalf of those of its members who are in the classified civil service, and by twelve individuals who occupy positions in the Federal Government which are under the classified civil service. The suit is brought to secure a declaration of the invalidity of, and an injunction against the enforcement of the provisions of the second sentence of Section 9 (a) of the Hatch Act on the ground that the prohibitions imposed by this Section deprive plaintiffs of the basic civil rights of freedom of speech, of assembly and of the press, the right to engage in political activity, and the right to be free from arbitrary discrimination in their Federal employment, guaranteed to them by the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

The second sentence of Section 9 (a) of the Hatch Act forbids plaintiffs to "take any active part in political management or political campaigns". The penalty for engaging in any of the activities thus forbidden is dismissal from the office held by the employee as prescribed by Section 9 (b) of the Hatch Act. The general terms of the prohibition are given content by Section 15 of the Hatch Act which incorporates into Section 9 (a) certain interpretations of the Civil Service Commission which specify certain acts as constituting active participation in political management or political campaigns. As the language of Section 9 (a) is thus defined, it prohibits Federal employees subject to its terms from doing such acts as writing a letter to a newspaper with reference to a candidate or political issue, make public speeches on such subject, persuade others to their point of view publicly or privately when such conduct constitutes active participation in a political campaign, dis-

tribute leaflets or other literature, participate in a parade, initiate a petition, and perform other acts which have been traditionally regarded as obvious forms of the exercise of the rights of freedom of speech, of the press and of assembly.

The statutory court held that the second sentence of Section 9(a) of the Hatch Act was valid and did not infringe on any rights of plaintiffs protected by the Constitution. The court rested this conclusion on the ground that Congress had authority to remove Federal employment from the sphere of political activity and the reasonableness of the means used to reach this result is a question for Congress and not the courts to decide.

Accordingly, the questions presented include the following:

1. Whether the second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution on the ground that it prohibits the free exercise of the rights of freedom of speech, of the press and of assembly guaranteed to all persons by the First Amendment of the Constitution of the United States.

The United States Supreme Court has held unconstitutional statutes and ordinances which place a restraint upon the right of free speech, press and assembly. *Thornhill v. Alabama*, 310 U. S. 88; *Lovell v. City of Griffin*, 303 U. S. 44; *Schneider v. New Jersey*, 308 U. S. 147. The Hatch Act places restrictions upon the exercise of such rights by Federal workers. It is well settled that such restraints are permissible only if there exists a clear and present danger of an evil which the government has an interest in suppressing. Political activity by Federal employees is not such an inherently dangerous subject matter as to fall within the "clear and present danger" doctrine. On the contrary it is the cornerstone of our democratic form of government.

The legislative history of the Hatch Act shows that political activity of government workers carried on in their capacity as private citizens without abuse of authority is not an evil which the government has an interest in suppressing. Moreover, the wide scope of the prohibition on political activity of such government employees is not reasonably related to the end of suppressing improper political activities by such persons. The suppression of all such activity by those within a specific group of the population exceeds the constitutional powers of Congress. The United States Supreme Court has held that "the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge* v. *State of Oregon*, 299 U. S. 353, 364-365.

The power of the government to impose the limitations in Section 9(a) of the Hatch Act on political activity of employees is not enlarged by the fact that the government is the employer. The government as an employer enjoys no absolute power (*Ex parte Curtis*, 106 U. S. 371, 376). The government as employer may make reasonable regulations concerning Federal employment (*U. S.* v. *Thayer*, 209 U. S. 39, 42-43), but its power does not exceed the limits of reasonableness (*People* v. *Crain*, 214 U. Y. 154).

Although Federal employment be regarded as a privilege, the granting of the privilege or the withholding of it is nevertheless limited by the Constitution (*Pike* v. *Walker*, 73 App. D. C. 291, 121 F. (2d) 39; *U. S. ex rel. Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407, 430).

2. Whether the second sentence of Section 9(á) of the Hatch Act is repugnant to the Constitution on the ground that it imposes arbitrary and unreasonable restrictions upon Federal employees subject to its provision, in violation of the Fifth Amendment of the Constitution of the United States.

While unlike the Fourteenth Amendment, the Fifth Amendment does not expressly prohibit legislative action which denies the equal protection of the laws to any person, the Supreme Court has made it clear that the Fifth Amendment affords protection against congressional action which involves "discrimination of such an injurious character as to bring into operation the due process clause." *Curran v. Wallace*, 306 U. S. 1, 14; *Skinner v. Oklahoma*, 316 U. S. 315.

The statute exempts from the scope of the second sentence of Section 9(a), among others, the following: persons whose compensation is paid from the appropriation for the Office of the President, heads and assistant heads of executive departments, as well as employees of any educational institution supported in whole or in part by any state or subdivision thereof. These employees have the readiest access to official authority and power, yet under the Hatch Act they enjoy absolute freedom to engage in political activity. In substance, those with minimal authority, and hence least likely to coerce others when engaging in political activity, such as the plaintiffs in this action, are prohibited from engaging in it while those having the widest authority and hence potentially the widest coercive power, by virtue of their official positions, are not limited by this statute in their political activity.

3. Whether the second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution on the ground that it deprives the Federal employees subject to its terms of the fundamental right to engage in political activity reserved to the people by the Ninth and Tenth Amendments to the Constitution of the United States.

The present case does not involve the rights of the States as against the power of the Federal government. The conflict between the rights and powers reflected in this suit are

the rights reserved to the people as against both State and Federal power.

The right to organize a political movement to engage in political activity and in so doing to exercise the right of freedom of association, of assembly, of the press and of speech is a basic right of the American people. These guarantees are embodied in the Ninth and Tenth Amendments. The Ninth Amendment states specifically "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth Amendment reserves to the people the powers not delegated.

The States may not infringe upon such rights by unreasonable regulations (*Stromberg* v. *California*, 283 U. S. 259, 369). In that case Chief Justice Hughes said:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system."

The Federal government is equally impotent to infringe upon such liberties by unreasonable regulation (*Palko* v. *Connecticut*, 302 U. S. 319).

The legal issues thus presented by the decision of the court below are substantial and their resolution involve not only the civil rights of the twelve individual plaintiffs in this action and of the numerous members of UFWA on whose behalf it brings suit, but it also vitally concerns the constitutional right of millions of Federal employees to participate fully in the democratic processes of government. Thus the millions of citizens subject to the prohibition of Section 9(a) of the Hatch Act by virtue of the fact that they are government employees are at the present time forbidden by that Act to take an active part in elections resolving issues of national and international significance, in which

these citizens employed by the government have the same vital interest which other citizens not so employed possess.

Opinion of the Court

A copy of the opinion of Justice Bailey on behalf of the statutory court, filed on August 4, 1944, is affixed hereto as "Exhibit B".

Conclusion

It is thus clear that this appeal is within the exclusive jurisdiction of the Supreme Court, and that substantial questions of widespread importance are involved, requiring review of the judgment of the statutory court in a full hearing on the merits.

Respectfully submitted,

LEE PRESSMAN,
Attorney for Plaintiff.

October 25, 1944.

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EXHIBIT "A"

FORM 1236
January 1944

UNITED STATES CIVIL SERVICE COMMISSION

POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS

OF FEDERAL OFFICEHOLDERS AND EMPLOYEES

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1944

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POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS OF FEDERAL OFFICEHOLDERS AND EMPLOYEES

I. GENERAL PROHIBITIONS

1. Civil-service rule I and the act of August 2, 1939 (as amended)—

Civil-service rule I, section 1, reads as follows:

No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinions on all political subjects, shall take no active part in political management or in political campaigns.

The act of August 2, 1939, as amended (U. S. Code, title 18, section 61), provides in part as follows:

It shall be unlawful for any person employed in any administrative position by the United States, or by any department, independent agency, or other agency of the United States (including any corporation controlled by the United States or any agency thereof, and any corporation all of the capital stock of which is owned by the United States or any agency thereof) * * *, to use his official authority for the purpose of interfering with or affecting the election or the nomination of any candidate for the Office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions (act of August 2, 1939, sec. 2, 53 Stat. 1147, as amended July 19, 1940, 54 Stat. 767).[1]

It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material,[2] shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President

[1] Penalty for violation of this section is a fine of not more than $1,000 or imprisonment for not more than 1 year, or both (act of August 2, 1939, sec. 8, 53 Stat. 1148).

[2] Title VII, Public Law 507, 77th Cong., approved March 27, 1942.

of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person (act of August 2, 1939, sec. 9, 53 Stat. 1148, as amended July 19, 1940, 54 Stat. 767).

For the purposes of this Act, persons employed in the government of the District of Columbia shall be deemed to be employed in the executive branch of the Government of the United States, except that for the purposes of the second sentence of section 9 (a) the Commissioners and the Recorder of Deeds of the District of Columbia shall not be deemed to be officers or employees (act of August 2, 1939, sec. 14 added July 19, 1940, 54 Stat. 767).

The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns (act of August 2, 1939, sec. 15 added July 19, 1940, 54 Stat. 767).

Nothing in sections 2, 9 (a), or 9 (b), or 12 of this Act shall be deemed to prohibit or to make unlawful the doing of any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the United States; or by any recognized religious, philanthropic, or cultural organization (act of August 2, 1939, sec. 21 added October 24, 1942, Public Law 754, 77th Cong.).

The rule and the statutes quoted above are general prohibitions against participation in politics by officers and employees of the Government. All officers and employees of the Government are, in addition, subject to a number of statutes relating to solicitation of political contributions, political coercion, political discrimination, and the purchase and sale of public office, which are set forth in sections of this publication.

Every Government employee is expected to be familiar with the statutes and the rules relating to political activity; ignorance does not excuse their violation. Each appointee to the classified service on entering on duty is required to sign a statement that he will familiarize himself with the rule and the laws relating to political activity.

II. JURISDICTION OF THE COMMISSION

2. **Federal employees.**—There is no language in the Hatch Act fixing responsibility for enforcement as to Federal employees. Thus, enforcement of section 9 as to these employees devolves upon the individual departments and independent establishments. However, it is important to note that civil-service rule I, which uses prohibitive language identical with that in the Hatch Act, is still in full force and effect as to employees in the competitive classified service. Indeed, subsequent to the passage of the Hatch Act this rule has been amended to conform with prohibitive language in section 9 of the Hatch Act, by Executive Order No. 8705, March 5, 1941, and promulgated anew. Thus, the Commission has jurisdiction to enforce the political-activity restrictions of the rule, and this jurisdiction, under an opinion of the Attorney General of the United States dated January 8, 1941, is concurrent with the statutory responsibility of the individual employing departments and independent establishments as to employees in the competitive classified service.

Prior to the passage of the Hatch Act, the Commission had authority to impose penalties for violations of the rule ranging from a reprimand or suspension to removal. The Attorney General held in the opinion referred to above that in cases where both the law and the civil service rule were violated the statutory penalty, which is removal from the service, is mandatory. The law definitely states with respect to Federal employees that a person found to have committed a violation must be immediately removed from the position or office held by him and must not be reemployed in such position or office (sec. 9 (b)).

Civil-service rule XV reads as follows:

Legal appointment necessary to compensation.—Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or rules, or of any Executive order or any regulation of the Commission, or that any employee subject thereto has violated such act, rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instruction of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing (Executive Order No. 8705, March 5, 1941).

The General Accounting Office is without jurisdiction to review the determinations of the Civil Service Commission under rule XV and, upon certification by the Commission that an employee is holding a position in violation of the Civil Service Act and rules, the General Accounting Office has no alternative to withholding credit for payments made for salary or compensation (decision, Comptroller General, July 20, 1939, to the Postmaster General).

With respect to employees in nonclassified or excepted positions, the jurisdiction to determine whether or not there has been a violation of the Hatch Act is vested in the head of the department or independent establishment concerned with making the removal (opinion, Attorney General, July 22, 1940). However, this jurisdiction is limited by section 15 of the act to a determination of facts. Thus, the head of the department or independent establishment may decide whether or not an employee under his jurisdiction did in fact engage in certain activities. However, the question of whether such activities constitute a violation would, under the act, be determined by application of section 15, which provides that those activities are to be considered as in violation of the act which the Commission had theretofore determined were in violation of the civil-service rules prohibiting political activity.

3. **Civil Service Commission regulations.**—In taking action on alleged violations of section 1 of civil-service rule I, the Civil Service Commission proceeds under the following regulations:

(1) **Investigations.**—(*a*) Investigations of charges of political activity on the part of an officer or employee (both hereinafter comprehended within the term "employee") subject to the provisions of section 1, civil-service rule I, shall be conducted jointly by representatives of the Commission and of the department or agency where the individual is employed, unless either the Commission or the department or agency signifies that it will be unable to participate in the investigation. The Commission shall be notified of any complaint of political activity received by a department or agency and shall be given an opportunity to cooperate in any investigation that the department or agency may decide to make. Likewise, the Commission will not proceed with any investigation until the department or agency has been notified and has been given an opportunity to participate.

(*b*) During the course of the investigation the employee shall be afforded an opportunity to make a statement, either personally or in writing, before the investigator, and he shall be allowed to furnish names of witnesses who will support the statements he has made to the investigator.

(2) **Proposed order.**—When the Commission reaches the conclusion that a violation of section 1, civil-service rule I, has been established by the investigation, it shall issue a proposed order. This order, which shall include a statement of the charges against the employee and of the information in support thereof, shall be sent to the employee by registered mail, and he shall be allowed fifteen days from the date of service to respond thereto in writing. A copy of this order shall also be sent to the department or agency in which the individual is employed. With his reply to the proposed order, the employee may request a hearing as hereinafter provided.

(3) **Hearing.**—(*a*) The granting of a hearing shall not be a matter of right but shall be within the discretion of the Commission. No hearing shall be authorized in cases where the employee has admitted a violation or where a violation is established by indisputable record evidence.

(*b*) Hearings shall be held before a Hearing Examiner designated by the Commission and shall be at the Commission's office in Washington, D. C., unless the Commission shall order that the hearing be held elsewhere. All testimony shall

be under oath or affirmation. The employee may appear personally or by or with counsel. Counsel appearing shall have been admitted to practice before the Commission in accordance with rule 4 of the Rules of Practice under the act of August 2, 1939, as amended.

(c) The hearing shall be of the limited scope necessitated by the Commission's lack of the power of subpoena in proceedings under section 1, civil-service rule I. Because of the absence of that authority, it cannot undertake to conduct said hearing as a proceeding de novo, or to have evidence introduced therein in support of the charges against the respondent. Owing to the lack of subpoena power, evidence in support of charges must be limited to information given voluntarily. Such information is obtained upon an understanding of confidential treatment. Consequently, evidence supporting the charges cannot be introduced at the hearing. The hearing shall be unilateral, that is, it shall be only for the presentation of evidence on behalf of the employee in rebuttal of the charges disclosed by the proposed order. Counsel for the Commission may cross-examine witnesses.

(d) It shall be within the discretion of the Hearing Examiner to permit, and fix the time for, filing of briefs. The proceeding at the hearing will not be reported, unless the Commission shall so direct; but the employee shall have the privilege of himself having the evidence taken stenographically. If the proceeding is not taken by a reporter on behalf of the Commission, the employee and Commission counsel shall submit a summary thereof to the Hearing Examiner within a time fixed by him. Any disagreement concerning the contents of the summary shall be resolved by the Examiner, and the parties may file written exceptions. The summary and any exceptions shall be certified by the Hearing Examiner and shall become a part of the record.

(4) Final order.—(a) The Commission's final order shall be based on the entire record of the case, including the report of the investigation, the reply of the employee to the proposed order and in cases where a hearing has been granted, the report of the Hearing Examiner. If the employee does not reply to the proposed order within fifteen days from the date of service, final order shall be based on the report of investigation alone.

(b) The final order shall contain a statement of the charges that have been substantiated and shall prescribe the penalty to be imposed. It shall be served on the department or agency wherein the individual is employed, together with a copy to be forwarded to the respondent.

(5) Penalties.—(a) Since violations of section 1, civil-service rule I, are by law violations also of section 9 (a) of the Hatch Act, the penalty required by that act must of necessity be imposed. The employee must be immediately removed from the position or office held and may not again be employed in such position or office. If the appointing officer fails to carry out the instructions of the Commission within ten days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officer for proceedings in accordance with civil-service rule XV.

(b) When the Commission recommends the removal of an employee for a violation of section 1, civil-service rule I, and the Hatch Act, the penalty laid down in paragraph (a) of this section shall be applied, even where the department or agency reports that the individual has been removed on grounds other than a violation of section 1, civil-service rule I, and the Hatch Act, and the individual may not again be employed in the position from which he was removed. The

provisions of section 6 of these regulations regarding reinstatement in positions other than the one from which removal was effected shall also apply.

(c) The above procedure shall apply also where an employee has resigned from his position or office prior to the Commission's determination that he had violated section 1, civil-service rule I, and the Hatch Act.

(6) Reinstatement.—An employee removed for violation of section 1, civil-service rule I, may be reinstated, in accordance with the provisions of civil-service rule IX, in any position for which he can qualify other than the one from which he was removed: *Provided*, That the Commission shall in each case establish a period of time after removal, the length of which shall vary with the circumstances of the particular case, during which the reinstatement of the officer or employee to any position in the Federal service will not be approved.

III. APPLICABILITY OF THE RULE AND STATUTE

4. In general.—For many years employees in the competitive classified service have been prohibited from taking an active part in politics by civil-service rule I. In addition to this rule, such employees are now subject to the restrictions of the act of August 2, 1939. This is true regardless of whether the classified status was acquired through competitive examination, classification by statute, or classification by Executive order.

Only the first sentence of section 1, civil-service rule I, applies to employees in positions excepted from the competitive classified service. This sentence has been partially enacted in section 2 of the act of August 2, 1939, and violation of this provision of the statute constitutes a criminal offense.

Under section 9 (a) of the act of August 2, 1939, all persons employed in the executive branch of the Federal Government [*] whether or not such persons are in the classified service, are prohibited from using their official authority or influence for the purpose of interfering with an election or affecting the results thereof, and from taking an active part in political management or in political campaigns. It should be noted that by the terms of title VII of Public Law 507, 77th Cong. (Second War Powers Act, approved March 27, 1942), the restriction against taking any active part in political management or political campaigns does not apply in the case of "a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material." However, such employees are subject to the restriction which prohibits the use of official authority or influence for the purpose of interfering with an election or affecting the results thereof.

The Hatch Act expressly reserves to Government employees the right to vote and the right to express their opinions on all political

[*] Except (a) the President and Vice President of the United States; (b) persons whose compensation is paid from the appropriation for the office of the President; (c) heads and assistant heads of executive departments; (d) officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

subjects and candidates. This expression of opinion may be made publicly,* but it must not be such as to amount to taking an active part in an organized political campaign. The effect of section 9 (a) of the statute, therefore, is to place the same restrictions upon the political activities of all officers and employees of the executive branch of the Government, as section 1 of civil-service rule I places upon the political activities of employees in the classified service. Moreover, section 15 of the act expressly provides that the activities which are prohibited by the act are the activities which the Commission had theretofore determined were prohibited on the part of employees in the classified civil service by the provisions of the civil-service rules forbidding the taking of an active part in political management or in political campaigns.

5. **Substitute or part-time employees.**—Persons whose employment with the Federal Government is only part-time, or intermittent, not in any case occupying a substantial portion of the individual's time and not affording the employee's principal means of livelihood, are subject to the law while in an active-duty status, not otherwise. Under such conditions employees may hold public elective office or be listed as candidates for such office provided that they do not engage in political activity or political management during periods of active duty. The period of active duty embraces the whole period of status as a paid employee, rather than just the working hours of the day.

6. **Employees on leave.**—It is not permissible for an employee to take leave of absence for the purpose of working for a political committee or organization or of becoming a candidate for elective office with the understanding that he will resign his position if nominated or elected.

7. **Retired employees.**—Persons retired from public office or employment are not regarded as subject to the restrictions of the law. Such persons may engage in politics to the same extent as persons not connected with the public service.

However, in any case where an annuitant is reemployed in the executive branch of the Federal Government, the political-activity restrictions of the act would apply. In this connection it should be noted that the individual's annuity would be suspended by his reentry to the Federal service and he would necessarily be considered as a Federal employee subject to the same political-activity restrictions that are applicable to other employees in the executive branch of the Federal Government.

8. **Postmasters and post office employees.**—For many years the political activities of certain post office employees, such as rural carriers and fourth-class postmasters, were restricted by the terms of specific Executive orders. However, such employees, including all postmasters, are now subject to the political-activity restrictions of section 1 of civil service rule I and section 9 (a) of the Hatch Act.

9. **Star route and contract carriers—special-delivery messengers—clerks in third- and fourth-class post offices.**—It has been held that persons em-

* Opinion, Attorney General, January 8, 1941.

ployed in these positions are not employees of the United States within the meaning of the Hatch Act and that consequently the provisions thereof do not apply to them.

10. **Employees in the District of Columbia government.**—The Hatch Act specifically provides that for the purposes of the act persons employed in the government of the District of Columbia shall be deemed to be employed in the executive branch of the Government of the United States. Therefore, the political activities of such employees, with the exception of the Commissioners and the Recorder of Deeds of the District of Columbia, who are not subject to the restriction against taking any active part in political management or in political campaigns, are subject to the same restrictions as are applied to Federal officers and employees.

11. **Attorney General's decisions.**—In addition to the types of employees mentioned in the preceding paragraphs, Circular No. 3301 of the Attorney General's Office, dated October 26, 1939, lists the following officers and employees in the executive branch of the Federal Government as being affected by the provisions of section 9 of the Hatch Act:

(1) United States attorneys and marshals, their assistants and deputies.

(2) Special attorneys of the Department of Justice and special assistants to the Attorney General.

(3) Officers and employees of Governmental agencies, such as the Home Owners' Loan Corporation, the Reconstruction Finance Corporation, and the Public Works Administration.

(4) Officers and employees occupying administrative and supervisory positions in the Work Projects Administration, the National Youth Administration, and the Civilian Conservation Corps.

The same circular states that the act has been construed as not applying to the following:

(1) Officers and employees of the legislative branch of the Federal Government, including secretaries and clerks to Members of Congress and Congressional committees.

(2) Officers and employees of the judicial branch of the Federal Government, including United States commissioners, clerks of United States courts, referees in bankruptcy, and their secretaries, deputies, and clerks.

(3) Persons who are retained from time to time to perform special services on a fee basis and who take no oath of office, such as fee attorneys, inspectors, appraisers, and management brokers for the Home Owners' Loan Corporation, and special fee attorneys for the Reconstruction Finance Corporation.

(4) Persons who receive benefit payments, such as old-age assistance and unemployment compensation under the Social Security Act, rural rehabilitation grants, and payments under the agricultural-conservation program.

The Attorney General also ruled in an opinion to the Secretary of State, dated October 19, 1940 (39 Op. Atty. Gen. 508), that ambassadors and ministers were not prohibited from taking an active part in political campaigns.

IV. PROHIBITED ACTIVITIES*

12. **In general.**—In brief it may be said that the law is designed to prevent those subject to it from assuming general political leadership or from becoming prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office. The following sections are devoted principally to a discussion of activities which had been decided by the Commission as prohibited by the civil-service rules prior to the enactment of section 15 of the Hatch Act, July 19, 1940.

13. **Activity by indirection.**—Any political activity which is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are, therefore, accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation.

This does not mean that an employee's husband or wife may not engage in politics independently, upon his or her own initiative, and in his or her own behalf. Thus, for example, the Commission has held that the wife of a Federal employee might serve as a member of a board of election officers, it being affirmatively shown that the husband was not involved in politics. Cases have arisen, however, in which the facts showed that the real purpose of a wife's activity was to accomplish a political act prohibited to her husband, the attempt being made for her husband's benefit and at his instigation or even upon his coercion. This may be true of individuals or it may occur among groups of employees' wives, associated for the purpose of securing for their husbands what the husbands may not secure for themselves. In such situations, it is obvious that the prohibitions against political activity are being violated. The collusion or coercion renders the wife's activity imputable to the husband, he being guilty of the same infraction as if he were openly a participant.

14. **Conventions.**—Candidacy for or service as delegate, alternate, or proxy in any political convention or service as an officer or employee thereof is prohibited. Attendance merely as a spectator is permissible, but the employee so attending must not take any part in the convention or in the deliberations or proceedings of any of its committees, and must refrain from any public display of partisanship or obtrusive demonstration or interference.

15. **Primaries—caucuses.**—An employee may attend a primary meeting, mass convention, caucus, and the like, and may cast his vote on any question presented, but he may not pass this point in participating in its deliberations. He may not act as an officer of the meeting, con-

* All items under this heading are subject to the exceptions in section 18 of the Hatch Act. (See subsection 29, page 15.)

vention, or caucus, may not address, make motions, prepare or assist in preparing resolutions, assume to represent others, or take any prominent part therein.

16. **Meetings.**—Service in preparing for, organizing or conducting a political meeting or rally, addressing such a meeting, or taking any part therein except as a spectator is prohibited.

17. **Committees.**—The holding of the office of Political Committeeman such as precinct committeeman, ward committeeman, etc., or service on or for any political committee or similar organization is prohibited. An employee may attend as a spectator any meeting of a political committee to which the general public is admitted but must refrain from activity as indicated in the preceding paragraphs.

Whether a committee has an ultimate political purpose determines whether a classified employee may properly serve as a member. Assignment may be to duties which, if considered alone, would seem far removed from active politics but which, when considered as a part of the whole purpose, assume an active political character. Thus the Commission has forbidden a civil-service employee to serve as chairman of the food committee at an occasion signifying the opening campaign speech of a nominee for Governor of a State. No attempt can be made to differentiate between workers on or under political committees with respect to the degree to which they are politically active.

18. **Clubs and organizations.**—Employees may be members of political clubs, but it is improper for them to be active in organizing such a club, to be officers of the club or members or officers of any of its committees or to act as such, or to address a political club. Service as a delegate from such a club to a league of political clubs is service as an officer or representative of a political club and is prohibited, as is service as a delegate or representative of such a club to or in any other organization. In other words, an employee may become a member of a political club, but may not take an active part in its management or affairs, and may not represent other members or attempt to influence them by his actions or utterances.

Section 6 of the act of August 24, 1912 (37 Stat. 555), provides in part—

> That membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said Postal Service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof, shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service.

Membership in a labor union by employees subject to the Hatch Act is not prohibited, where the organization is nonpartisan in character and has as its primary object improvements in the conditions of labor

of its members and other matters related to their individual welfare. Thus, the Commission has held that employees subject to the Hatch Act may hold memberships in the Central Labor Union.

Likewise it has been held that matters concerned solely with organization and management of a union of Federal employees are not political management or political activity in violation of section 9 (a) of the Hatch Act, and that adoption of a resolution limited to these matters would not violate the law.

Section 9A of the act of August 2, 1939, provides as follows:

(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.

Civil-service employees may hold office in organizations established for social betterment. It is pointed out, however, that in certain circumstances activities of such organizations may take on a character of partisan political activity. Employees who become members or officers of organizations of this type must take the responsibility for seeing that the activities in which they engage do not become political in character.

19. **Civic organizations and citizens' associations.**—Activity in organizations having for their primary object the promotion of good government or the local civic welfare is not prohibited by the act of August 2, 1939, as amended, provided such activities have no connection with the campaigns of particular candidates or parties.

20. **Contributions.**—Employees may make voluntary contributions to a regularly constituted political organization for its general expenditures, subject to the limitation laid down in section 13 of the act. The term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.

While employees may make contributions, they may not solicit, collect, receive, disburse, or otherwise handle contributions made for political purposes.

The Commission has held that voluntary contributions may be made at any time, even subsequent to a general election, so long as they are made to a regularly constituted political organization for its general expenditures.

In addition, sections 118 to 121 of the Criminal Code place certain restrictions on contributions by Federal employees. Contributions may not be handed over to another person in the Federal service; they may not be made in a Federal building; etc. For the text of these sections of the Criminal Code and further information on this matter, see

Parts VII, VIII and IX, pages 25 through 30. These sections of the Criminal Code are within the jurisdiction of the Department of Justice and the law provides severe penalties for violations.

21. **Expression of opinions.**—Although the act reserves to employees affected the right to "express their opinions on all political subjects and candidates," this reservation is subject to the prohibition that employees may not take any active part in political management or in political campaigns. Public expression of opinion in such a way as to constitute taking an active part in political management or in political campaigns is accordingly prohibited.

An employee is not prohibited from wearing a political badge or button or displaying a political poster in the window of his home or on his automobile. However, it is regarded as a violation of the spirit of the law for a public servant to make a partisan display of any kind while on duty conducting the public business.

It should be remembered that employees are forbidden to become prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office. Thus, distribution of campaign literature, badges, or buttons is prohibited activity.

22. **Newspapers—publication of letters or articles.**—An employee may not publish or be connected editorially or managerially with any newspaper generally known as partisan from a political standpoint, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, or faction. An employee who writes such a letter or article is responsible for any use that may be made of it whether or not he gives consent to such use.

The Commission has held that as a general rule a newspaper which is considered as being partisan from a political standpoint, either during the campaign or in the interval between campaigns, is regarded as being subject to application of the regulations against activity in connection therewith. It is not required that a publication be regarded as the organ of a political organization or that it have an official connection with any political organization or party. The terms "editorial and managerial" are intended to apply to responsibilities and duties which have to do with the making of decisions affecting the editorial policies. The objective behind the restriction on activity in connection with such publications or newspapers is prohibition of political activity of a partisan character through the medium of the public press by a person subject to the statute.

Whether or not ownership of stock or membership on a board of directors of a corporation which publishes a daily newspaper is a violation of the political-activity regulations will depend upon the degree to which the individual, by virtue of such ownership or membership, participates in controlling the editorial policy or news management of the publication. If a Federal employee makes decisions or assists in making decisions on editorial policy or news management with respect to the political status of the publication, a violation of

the regulations occurs, but mere ownership of stock would not of itself constitute a violation of the political-activity regulations.

There is no direct prohibition against correspondence work by an employee for newspapers. The employee will have the responsibility, however, of ascertaining that any material he submits is not in contravention of the regulations.

23. **Activity at the polls and for candidates.**—An employee has the right to vote as he pleases, and to exercise this right free from interference, solicitation, or dictation by any fellow employee or superior officer or any other person. It is a violation of the Federal Corrupt Practices Act to pay or offer to pay any person for voting or refraining from voting, or for voting for or against any candidate for Senator or Representative in, or Delegate or Resident Commissioner to, Congress. It is also a violation of the law to solicit, receive, or accept payment for one's vote or for withholding one's vote. (See U. S. Code, title 2, sec. 250.)

Under the act of August 2, 1939, it is a criminal offense for any person to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote as he may choose in any election of a National character. It is also a criminal offense to promise any employment, position, work, or compensation, or other benefit made possible by an act of Congress, as a consideration, favor, or reward for political activity or for the support of or opposition to any political candidate or party.

An employee subject to the law must avoid any offensive activity at primary and regular elections. He must refrain from soliciting votes, assisting voters to mark ballots, helping to get out the voters on registration and election days, acting as the accredited checker, watcher, or challenger of any party or faction, or any other partisan political activities at the polls. Rendering partisan political service, such as transporting voters to and from the polls and candidates on canvassing tours, whether for pay or gratuitously, is held to be within the scope of prohibited political activities. This is not intended to prohibit one subject to the act from transporting members of his immediate family to and from the polls, in view of the community of interest that exists in such cases. The foregoing provisions do not apply if the election in question is covered by the exceptions embodied in section 18 of the law of August 2, 1939, as amended. (See subsection 29, page 15.)

24. **Election officers.**—Service as an election officer of any kind, in which an individual's activities are such as to show partisanship or partisan political management, is prohibited.

25. **Parades.**—An employee may not participate in or help organize a political parade. An employee may be a member of a band or orchestra which takes part in parades or rallies provided such band or orchestra is generally available for hire as a musical organization.

26. **Petitions.**—The first amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridg-

ing the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." Section 6 of the act of August 24, 1912 (37 Stat. 555), provides that "the right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any Committee or Member thereof, shall not be denied or interfered with."

An employee subject to the law of August 2, 1939, as amended, is permitted to sign petitions, including nominating petitions, as an individual, without reference to his connection with the Government, but he may *not* initiate them, or canvass for the signatures of others, if such petitions are identified with political management or political campaigns. Employees are permitted to exercise the right as individuals to sign a petition favoring a candidate for office, but they may not do so as Government employees or as a group or association of Government employees.

27. **Applying for Presidential positions not in the classified service.**—When a classified employee seeks promotion by appointment or transfer to a Presidential office not in the classified service, there is no objection to his becoming a candidate for such an office, provided the consent of his department is obtained, and provided he does not violate section 1 of rule I, prohibiting the use of his official authority or influence in political matters and provided further that he does not neglect his duty and avoids any action that would cause public scandal or semblance of coercion of his fellow employees or of those over whom he desires to be placed in the position he seeks.

A classified employee may circulate a petition or seek endorsements for his own appointment to a Presidential position, subject to the qualifications above stated, and he may, as an individual, sign a petition or recommend another person for such an appointment; but he may not circulate a petition, or solicit endorsements, recommendations, or support for the appointment of another person to such a position, whether such other person is a fellow employee or one not at the time in the Government service.

28. **Candidacy for public office.**—Candidacy for nomination or for election to a National, State, county, or municipal office is not permissible. The prohibition against political activity extends not merely to formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy.

The Attorney General held in an opinion to the Secretary of the Interior dated April 17, 1940 (39 Op. Atty. Gen. 423), that the Hatch Act does not apply to the acceptance and holding of a local office to which an employee was elected without being a candidate, his name not appearing on the ballot but being written in by voters. However, the Commission interprets this opinion as applicable only in cases where the writing in of an employee's name is a spontaneous action on the part of the voters and does not come about as a result of pre-

arrangement whereby the employee was in effect a candidate before the vote was cast.

This decision is authority for the statement that the mere holding of a public office is not in itself a violation. (See also Attorney General's Circular No. 3301, October 26, 1939.)

However, it should be noted that membership on a political committee is not a public office within the meaning of the foregoing, even though held by election in the regular election as a political representative of a ward, precinct, county, or of the voting subdivision of a State. The holding of such political offices is prohibited.

V. ACTIVITIES MADE PERMISSIBLE BY THE DIRECT TERMS OF THE HATCH ACT AS AMENDED

29. **Nonpartisan local elections—Elections involving general questions.**—By the terms of section 18 of the Hatch Act as amended July 19, 1940 (54 Stat. 767), certain specific exceptions to the general prohibition against taking any active part in political management or in political campaigns are set forth. Section 18 reads as follows:

> Nothing in the second sentence of section 9 (a) or in the second sentence of section 12 (a) of this Act shall be construed to prevent or prohibit any person subject to the provisions of this Act from engaging in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected, or (2) in connection with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party.

The purport of section 18 is to remove from the prohibitions of the law activity which may, in a sense, be political but which is of a strictly local character, the issues of the election in question and the personalities of the candidates as such being divorced entirely from State and National political parties.

Each case necessarily must stand or fall on the facts involved therein. Some examples of the cases which have been decided under this section follow:

> The appointment of a person subject to the act or the rule to a position on a school board for the purpose of serving out the term of a member who has resigned is permissible where it can be shown that the duties do not involve any political activity.
>
> Officers or employees subject to the act or the rule may be candidates for a local fire board, on facts showing that the positions are of a purely local nature and nonpolitical, not involving a partisan election, and held without compensation.

In the case of a proposed charter amendment to permit municipal regulation of bus lines, it was decided that activities in connection with such a general question are such as would come within the terms of section 18 of the act.

In all such cases, however, the holding of the positions must not interfere with the efficient discharge of the duties of the Federal office and of this question the head of the Federal employing department is the sole judge.

30. **Communities adjacent to the District of Columbia or communities the majority of whose voters are employees of the Federal Government.**—For many years permission had been granted to employees residing in certain municipalities located near the District of Columbia whereby such employees were permitted to be candidates for and to hold local office in the municipalities in which they resided. This permission, which was granted either by an individual Executive order or by the action of the Commission based on an Executive order, remained in full force and effect until the passage of the act of August 2, 1939, which prohibited active participation in political management or in political campaigns without exception. When this act was amended by the act of July 19, 1940, a new section was added (section 16, 54 Stat. 767) whereby the Commission was authorized to promulgate regulations extending the privilege of active participation in local political management and local political campaigns to Federal employees residing in any municipalities or other political subdivisions of the States of Maryland and Virginia in the immediate vicinity of the District of Columbia or in municipalities the majority of whose voters are employed by the Government of the United States. This section of the amended act reads as follows:

Whenever the United States Civil Service Commission determines that, by reason of special or unusual circumstances which exist in any municipality or other political subdivision, in the immediate vicinity of the National Capital in the States of Maryland and Virginia or in municipalities the majority of whose voters are employed by the Government of the United States, it is in the domestic interest of persons to whom the provisions of this Act are applicable, and who reside in such municipality or political subdivision, to permit such persons to take an active part in political management or political campaigns involving such municipality or political subdivision, the Commission is authorized to promulgate regulations permitting such persons to take an active part in such political management and political campaigns to the extent the Commission deems to be in the domestic interest of such persons.

The Commission has promulgated regulations governing the extension of the privileges set forth in the section quoted above and copies of these regulations are available upon request to the Commission's central office in Washington, D. C. Under these regulations it is necessary that a formal request be received from the representatives of the community involved and that the petitioners furnish certain specified information relative to their community and its elections. In all cases the final decision as to the extension of the privileges of section 16 to any individual municipality depends on

the municipality's meeting certain prerequisites which are set forth in the Commission's regulations.

The privileges allowed by section 16 have after full consideration been extended by formal action of the Commission to the following municipalities or political subdivisions:

In Maryland

Annapolis (minute of the Commission, May 16, 1941).
Bladensburg (minute of the Commission, April 20, 1942).
Brentwood (minute of the Commission, September 26, 1940).
Capitol Heights (minute of the Commission, November 12, 1940).
Cheverly (minute of the Commission, December 18, 1940).
Chevy Chase, sections 1 and 2 (minute of the Commission, March 4, 1941).
Chevy Chase, section 3 (minute of the Commission, October 8, 1940).
Chevy Chase, section 4 (minute of the Commission, October 2, 1940).
Martin's Additions 1, 2, 3, and 4 to Chevy Chase (minute of the Commission, February 13, 1941).
Chevy Chase View (minute of the Commission, February 26, 1941).
Cottage City (minute of the Commission, January 15, 1941).
District Heights (minute of the Commission, November 2, 1940).
Edmonston (minute of the Commission, October 24, 1940).
Fairmount Heights (minute of the Commission, October 24, 1940).
Garrett Park (minute of the Commission, October 2, 1940).
Glenarden (minute of the Commission, May 21, 1941).
Glen Echo (minute of the Commission, October 22, 1940).
Greenbelt (minute of the Commission, October 4, 1940).
Hyattsville (minute of the Commission, September 20, 1940).
Kensington (minute of the Commission, November 8, 1940).
Mount Rainier (minute of the Commission, November 22, 1940).
North Beach (minute of the Commission, September 20, 1940).
North Brentwood (minute of the Commission, May 6, 1941).
North Chevy Chase (minute of the Commission, July 22, 1942).
Northwest Park (minute of the Commission, February 17, 1943).
Riverdale (minute of the Commission, September 26, 1940).
Seat Pleasant (minute of the Commission, August 31, 1942).
Somerset (minute of the Commission, November 22, 1940).
Takoma Park (minute of the Commission, October 22, 1940).
University Park (minute of the Commission, January 18, 1941).
Washington Grove (minute of the Commission, April 5, 1941).

In Virginia

Alexandria (minute of the Commission, April 15, 1941).
Arlington County (minute of the Commission, September 9, 1940).
Clifton (minute of the Commission, July 14, 1941).
Falls Church (minute of the Commission, June 6, 1941).

The Commission's actions extending the privileges of active participation in local self-government of the above-listed communities

of Maryland and Virginia to resident Federal officers or employees are subject to the following restrictions:

(1) Federal officers and employees in the exercise of these privileges must not neglect their official duties and must not engage in nonlocal partisan political activities.

(2) Federal officers and employees must not run for local office as candidates representing a political party or become involved in political management in connection with the campaign of a party candidate for office.

(3) Federal officers and employees who are candidates for local elective office must run as independent candidates and must conduct their campaigns in a purely nonpartisan manner.

(4) Federal officers and employees elected or appointed to local offices requiring full-time service must resign their positions with the Federal Government. If elected or appointed to offices requiring only part-time service they may accept and hold the same without relinquishing their Federal employment provided the holding of such part-time office does not conflict or interfere with their duties as officers or employees of the Federal Government. The department or independent agency in which Federal officers or employees are employed is the sole judge of whether or not the holding of the local office conflicts or interferes with their official duties as officers or employees of the Federal Government.

(5) The permission granted by the Commission to any particular community may be suspended or withdrawn by the Commission when in its opinion the activities resulting therefrom are or may become detrimental to the public interest or inimical to the proper enforcement of the political-activity law and rules.

VI. FEDERAL OFFICERS OR EMPLOYEES HOLDING LOCAL OFFICE

31. **General statement.**—While the Hatch Act and the civil-service rule prohibit Federal employees from being candidates for local elective office except in the instances mentioned in section V, subsection 30 above, there also must be considered those instances in which a Federal officer or employee wishes to accept an *appointive* office under a State or local government or in which a State or local officeholder wishes to accept Federal employment and does not wish to relinquish his State or local office or position. In these latter instances the mere holding of the local office in the absence of facts showing partisan political activity would *not* constitute a violation of the Hatch Act; however, the terms of an Executive order which has been in effect since 1873 must be applied.

This order, which is dated January 17, 1873, generally prohibits persons holding Federal civil office by appointment from, at the same time, accepting or holding any office or position under the State, Territorial, or municipal government. There are certain specific exceptions to this general prohibition set forth in the original order and subsequent amending orders and it has been ruled that unless

a position or office is specifically listed as an exception, it must be viewed as within the prohibitions of the order of 1873 (25 Dec. Comp. Treas. 234). Also, there is in effect, during the period of the present national emergency, Executive Order No. 8516 of August 15, 1940, which suspends and makes inoperative the Executive order of January 17, 1873, insofar as the United States Civil Service Commission shall by regulation authorize appointments to positions directly concerned with the national defense. The Commission has by formal action under the authority of the Executive order of August 15, 1940, decided that the Executive order of January 17, 1873, is not to be applied to persons appointed *subsequent* to August 15, 1940, to positions declared by the Commission to be directly concerned with the national defense.

For further information relative to the Executive order of January 17, 1873, the Executive order of August 15, 1940, and other amending orders, see subsections 32 through 35. NOTE.—*These Executive orders are no longer effective insofar as they conflict with the political-activity restrictions of section 9 (a) of the Hatch Act and are not to be construed as permitting officers and employees in the executive branch of the Federal Government to become candidates for any elective office which is to be filled in an election involving candidates who are either directly or indirectly representing a political party.*

32. **Executive order of January 17, 1873.**—This order, which is in full force and effect as applied to Federal employees holding positions not directly concerned with the national defense and to persons appointed to the Federal service prior to August 15, 1940, reads as follows:

Whereas it has been brought to the notice of the President of the United States that many persons holding civil office by appointment from him or otherwise under the Constitution and laws of the United States while holding such Federal positions accept offices under the authority of the States and Territories in which they reside, or of municipal corporations, under the charters and ordinances of such corporations, thereby assuming the duties of the State, Territorial, or municipal office at the same time that they are charged with the duties of the civil office held under Federal authority:

And whereas it is believed that, with but few exceptions, the holding of two such offices by the same person is incompatible with a due and faithful discharge of the duties of either office; that it frequently gives rise to great inconvenience, and often results in detriment to the public service; and, moreover, is not in harmony with the genius of the Government:

In view of the premises, therefore, the President has deemed it proper thus and hereby to give public notice that, from and after the 4th day of March, A. D. 1873 (except as herein specified), persons holding any Federal civil office by appointment under the Constitution and laws of the United States will be expected, while holding such office, not to accept or hold any office under any State or Territorial government, or under the charter or ordinances of any municipal corporation; and, further, that the acceptance or continued holding of any such State, Territorial, or municipal office, whether elective or by appointment, by any person holding civil office as aforesaid under the Government of the United States, other than judicial offices under the Constitution of the United States, will be deemed a vacation of the Federal office held by such person, and will be taken to be and will be treated as a resignation by such

Federal officer of his commission or appointment in the service of the United States.

The offices of justices of the peace, of notaries public, and of commissioners to take the acknowledgment of deeds, of bail, or to administer oaths, shall not be deemed within the purview of this order and are excepted from its operation, and may be held by Federal officers.

The appointment of deputy marshals of the United States may be conferred upon sheriffs or deputy sheriffs. Any deputy postmasters, the emoluments of whose office do not exceed $600 per annum, are also excepted from the operation of this order and may accept and hold appointments under State, Territorial, or municipal authority, provided the same be found not to interfere with the discharge of their duties as postmasters. Heads of departments and other officers of the Government who have the appointment of subordinate officers are required to take notice of this order, and to see to the enforcement of its provisions and terms within the sphere of their respective departments or offices and as relates to the several persons holding appointments under them, respectively.

33. **Interpretation of the order of January 17, 1873.**—An Executive order of January 28, 1873, as amended by Executive order of August 27, 1933, is as follows:

Inquiries having been made from various quarters as to the application of the Executive order issued on the 17th of January relating to the holding of State or municipal offices by persons holding civil offices under the Federal Government, the President directs the following reply to be made:

It has been asked whether the order prohibits a Federal officer from holding also the office of an alderman or of a common councilman in a city, or of a town councilman of a town or village, or of appointments under city, town, or village governments. By some it has been suggested that there may be distinction made in case the office be with or without salary or compensation. The city or town offices of the description referred to, by whatever names they may be locally known, whether held by election or by appointment, and whether with or without salary or compensation, are of the class which the Executive order intends not to be held by persons holding Federal offices.

It has been asked whether the order prohibits Federal officers from holding positions on boards of education, school committees, public libraries, religious or eleemosynary institutions incorporated or established or sustained by State or municipal authority. Positions and service on such boards and committees, and professorships in colleges* are not regarded as "offices" within the contemplation of the Executive order, but as employments or service in which all good citizens may be engaged without incompatibility and in many cases without necessary interference with any position which they may hold under the Federal Government. Officers of the Federal Government may therefore engage in such service, provided the attention required by such employment does not interfere with the regular and efficient discharge of the duties of their office under the Federal Government. The head of the department under whom the Federal office is held will in all cases be the sole judge whether or not the employment does thus interfere.

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*Includes assistant professorships in a State college, assistant lectureships in an evening school of a municipal university, instructorships in a State college, and similar positions in State and municipal colleges and universities (minute of Commission, August 7, 1937).

The question has also been asked with regard to officers of the State militia. Congress having exercised the power conferred by the Constitution to provide for organizing the militia, which is liable to be called forth to be employed in the service of the United States, and is thus, in some sense, under the control of the General Government, and is, moreover, of the greatest value to the public, the Executive order of the 17th January is not considered as prohibiting Federal officers from being officers in the militia in the States and Territories.

It has been asked whether the order prohibits persons holding office under the Federal Government being members of local or municipal fire departments, also whether it applies to mechanics employed by the day in the armories, arsenals, and navy yards, etc., of the United States. Unpaid service in local or municipal fire departments is not regarded as an office within the intent of the Executive order, and may be performed by Federal officers, provided it does not interfere with the regular and efficient discharge of the duties of the Federal office, of which the head of the department under which the office is held will in each case be the judge.

Mechanics and laborers employed by the day in armories, arsenals, navy yards, etc., and master workmen and others who hold appointments from the Government or from any department, whether for a fixed time or at the pleasure of the appointing power, are embraced within the operation of the order.

34. **Executive order of August 15, 1940.**—This order, which suspends the prohibitions of the Executive order of January 17, 1873, as applied to certain national-defense appointments and appointees, reads as follows:

By virtue of and pursuant to the authority vested in me by section 1753 of the Revised Statutes of the United States (U. S. C., title 5, sec. 631) and as President of the United States, it is ordered that the Executive Order of January 17, 1873, as amended, prohibiting, with certain exceptions, Federal officers and employees from holding State, territorial and municipal offices, be, and it is hereby, suspended and made inoperative in so far as the United States Civil Service Commission, shall, by regulation, authorize appointments to positions directly concerned with national defense.

The Commission has promulgated the following regulations to govern the application of the above-quoted Executive order:

1. August 15, 1940, shall be considered as the effective date for application of Executive Order 8516 and therefore the prohibitions of the Executive order of January 17, 1873, shall not be applied to persons appointed subsequent to August 15, 1940, to positions directly concerned with the national defense.

2. Executive Order 8516 shall apply with equal force and effect to Federal officers or employees appointed subsequent to August 15, 1940, to State or local positions directly connected with national defense and to State or local officers or employees appointed subsequent to August 15, 1940, to Federal positions directly connected with national defense.

3. (a) All Federal positions, appointments to which are governed by the War Service Regulations, shall be considered positions directly connected with national defense.

(b) The applicability of Executive Order 8516 to State or local positions will be determined by the facts in each particular case.

4. Nothing in these regulations, nor in Executive Order 8516, shall be construed to permit the holding of a State or local position by a Federal officer or employee or the holding of a Federal position by an officer or employee of a State or local government, when such holding is prohibited by the rules or regulations of the department or agency wherein said officer or employee is employed, or when the duties of the State or local position will conflict or interfere with the individual's official duties as a Federal employee, provided that the employing department or agency will be considered as the sole judge in determining these factors.

5. The terms of Executive Order 8516 are subject to the general political activity restrictions of section 1 of Civil Service Rule I and the Hatch Act. Therefore the authority granted by the Executive order can in no way be construed as authorizing any person subject to such political activity restrictions to become a candidate for election or re-election to any public elective office which is to be filled in an election involving party candidates.

35. **Executive orders creating exceptions to the Executive order of January 17, 1873.**—Federal employees are again cautioned that the authority conferred by these orders is now subject to the general restrictions of the Hatch Act. Thus, these orders do *not* authorize Federal employees to be candidates for *any* elective office which is to be filled in an election involving party candidates for public office.

A brief summarization of these orders is as follows:

Employees of the Department of Agriculture.—Officers and employees of the Department of Agriculture are authorized to hold State and Territorial positions when such action is deemed necessary by the Secretary of Agriculture to secure a more efficient administration (Executive order of June 26, 1907).

Collectors of cotton statistics, Bureau of the Census.—State and county officials may be appointed special agents under the Bureau of the Census for the collection of cotton statistics (Executive order of August 4, 1909).

Moderators of town meetings.—The temporary office of moderator of a town meeting and offices of a like character are excepted from the operation of the order of January 17, 1873 (Executive order of August 24, 1912).

Employees of the Reclamation Service and the National Park Service.—Employees of the Reclamation Service and the National Park Service may, with the approval of the Secretary of the Interior, accept appointments as deputy State fish or game wardens, if no compensation is attached to the position (Executive order of July 9, 1914).

Lighthouse Service—Laborers.—Laborers in charge of lights in the Lighthouse Service are excepted from the operation of the order of January 17, 1873 (Executive order of October 6, 1915).[1]

Special agents, Department of Labor.—Persons holding State, Territorial, or municipal positions may be appointed as special agents when such action is deemed necessary by the Secretary of Labor to secure a more efficient administration of any law coming within the purview of the Department of Labor (Executive order of January 2, 1923).

Employees of the Veterans' Administration.—Officers and employees of the United States Veterans' Administration serving in a medical capacity and on a part-time basis may with the consent of the Administrator hold State, county, or

[1] The Lighthouse Service has been consolidated with the Coast Guard, Treasury Department.

municipal positions in which employed in a medical capacity. Officers and employees of the United States Veterans' Administration may with the consent of the Administrator accept appointments under State, county, or municipal authority as deputy sheriffs (Executive order of August 6, 1924).

Employees of the Alaska Railroad.—Employees of the Alaska Railroad, permanently residing in municipalities on the line of the railroad, are permitted to become candidates for and hold municipal office therein (Executive order of October 22, 1926).

Appointments in the Department of Commerce.—Persons holding State, Territorial, or municipal positions may receive, unless prohibited by law, appointments under the Department of Commerce when the Secretary of that Department deems such employment necessary to secure more efficient administration of the duties of his department (Executive order of July 3, 1931).

Officers of the Public Health Service.—Officers of the Public Health Service are permitted, upon recommendation of the Surgeon General of the Public Health Service, and the approval of the Secretary of the Treasury, to hold office in State, Territorial, or local health organizations, in order to cooperate with and aid State, Territorial, or local health departments; and State, Territorial, or local health officials or employees are permitted, unless prohibited by law, to hold office in the Public Health Service when the Surgeon General and the Secretary of the Treasury deem such employment necessary to secure a more efficient administration of the duties imposed upon the Public Health Service (Executive order of August 31, 1931).

Offices under municipalities of the Virgin Islands.—Membership in the Colonial Council of the Municipality of St. Thomas and St. John, or in the Colonial Council of the Municipality of St. Croix, Virgin Islands, being unremunerative positions, shall not be deemed disqualification for employment in the Federal service of the Virgin Islands, notwithstanding the Executive order of January 17, 1873, provided it does not interfere with the efficient discharge of the duties of the Federal position, of which the head of the department under which the position is held will be the judge (Executive order of February 27, 1933).

Employees of the National Park Service.—Employees of the National Park Service are permitted, with the approval of the Secretary of the Interior, to accept appointments as deputy sheriffs under the laws of the States or Territories in which such employees may be on duty: *Provided*, That their services as such deputy sheriffs shall be without compensation and shall not in any manner interfere or conflict with the performance of their duties as employees of the National Park Service (Executive order of April 3, 1936).

Medical officers, Indian Service.—Officers and employees of the Indian Service, Department of the Interior, serving in a medical or sanitary capacity, either on a part-time or full-time basis, may hold, with the consent of the Secretary of the Interior, State, county, or municipal positions of a similar character: *Provided*, That such services shall not in any manner interfere or conflict with the performance of their duties as officers or employees of the Indian Service: *And provided further*, That there shall be no additional compensation when the Federal officer or employee is carried on a full-time basis (Executive order of May 13, 1936).

District advisers in the Interior Department under the act of June 28, 1934.—State, county, or municipal officers, when duly elected by qualified voters of a grazing district, may be appointed by the Secretary of the Interior to serve as

district adviser under the act of June 28, 1934 (48 Stat. 1269), as amended by the act of July 14, 1939 (Public, No. 173, 76th Cong.), for intermittent duty, when the Secretary of the Interior deems such services necessary in the interest of grazing on public lands (Executive order of June 17, 1937).

Immigration inspector, Department of Labor, Virgin Islands.—Officers and employees of the Municipalities of St. Thomas and St. John or of the Municipality of St. Croix, Virgin Islands, may be appointed to the position of immigration inspector for the Virgin Islands (Executive order of November 6, 1937).

Employees of the Interior Department.—Officers and employees of the Interior Department, upon approval of the Secretary of the Interior, may hold office under State, Territorial, and municipal governments engaged in cooperative and related work with the Department, provided that the services to be performed pertain to such work and do not interfere with the performance of the Federal duties. State, Territorial, and municipal employees engaged in cooperative and related work with the Interior Department may be appointed in the Department of the Interior when the Secretary deems such employment necessary to secure more efficient administration of said work. Appointments of such officers and employees to positions subject to the civil-service laws must be made in accordance with such laws (Executive order of January 21, 1938).

Employees of the United States Marshal for the Virgin Islands.—Any officer or employee of the police or prison departments of the Territorial and municipal governments of the Virgin Islands may be appointed to the position of deputy or any other position in the office of the United States Marshal for the Virgin Islands (Executive order of May 24, 1938).

Employees of the Division of Grazing, Department of the Interior.—Employees of the Division of Grazing of the Department of the Interior, with the approval of the Secretary, may accept appointment as deputy fire warden, deputy fish warden, or deputy game warden under the States in which such employees may be on duty, provided that their services in the State position are without compensation and do not interfere with the performance of the duties of the Federal position (Executive order of August 4, 1938).

School teachers and instructors.—Officers and employees of the Federal Government may hold positions as teachers or instructors in any State, Territorial, or municipal school or university, provided that their holding of such position shall not in any manner interfere or conflict with the performance of their duties during their regular hours of duty as officers or employees of the Federal Government (Executive order of April 11, 1940).

Utilization of services of State and local officers.—The heads of a number of Federal agencies are authorized by specific statutes to employ the services of State and local officers.

Employees residing in municipalities near the District of Columbia.—Special permission has been granted to employees residing in municipalities near the District of Columbia to hold local municipal office by the Executive order of February 14, 1912. However, the scope of such permission was restricted by the act of August 2, 1939, which prohibited active participation in political management or in political campaigns. When this act was amended July 19, 1940, provision was made for the reextension of these privileges. (See section 30, pages 16 through 18.)

VII. STATUTES RELATING TO POLITICAL ASSESSMENTS, POLITICAL COERCION AND DISCRIMINATION, AND THE PURCHASE AND SALE OF PUBLIC OFFICE

36. In addition to the restrictions of the act of August 2, 1939 (as amended), civil-service rules, Executive orders, and departmental regulations, the freedom of officers and employees of the executive civil service to engage in politics is limited further by a number of statutes. These statutes are generally applicable to all officers and employees of the United States, whether or not in the classified service, and, in some cases, the language of the statute is sufficiently broad to include any person receiving compensation for services from money derived from the Treasury of the United States, and other persons. These statutes are set forth in the following sections. Some of the activities prohibited under penalty of fine and imprisonment are:

1. Solicitation or receipt of political contributions by one officer or employee from another.
2. The giving or handing over of a political contribution by one employee to another.
3. Solicitation or receipt of political contributions in a Federal building by any person, whether or not an employee of the Government.
4. Solicitation or receipt by any person of political contributions from any person receiving any benefit under any act of Congress appropriating funds for relief.
5. Solicitation or receipt of any thing of value, either for personal reward or as a political contribution, in return for the promise to use, or the use of, influence to secure an appointive office under the United States.
6. Payment or the offer of payment for the use of influence in securing an appointive office under the United States.
7. Promising employment, compensation, or other benefit made possible by act of Congress as consideration or reward for political activity.
8. Discrimination by an officer or employee in favor of, or against another officer or employee on account of political contributions.
9. Depriving any person on account of race, creed, color, or political activity, of compensation or other benefit made possible by any act of Congress appropriating funds for relief.
10. Disclosure for political purposes of any list or names of persons receiving benefits under an act of Congress appropriating funds for relief and the receipt of such a list or names for political purposes.

VIII. POLITICAL ASSESSMENTS

37. **Solicitation or receipt of political contributions from Federal employees.**—The United States Code, title 18, section 208 (Criminal Code, sec. 118, as amended), provides as follows:

It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or em-

ployee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

Section 5 of the act of August 2, 1939, 53 Stat. 1148 (U. S. Code, title 18, section 61d), reads as follows:

It shall be unlawful for any person to solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever from any person known by him to be entitled to or receiving compensation, employment, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes.*

38. **Circulars of solicitation bearing names of Federal employees.**—In an opinion of October 17, 1902 (24 Op. 133), the Attorney General held that the sending of a circular letter by a political committee to Federal officers and employees soliciting financial aid in Congressional or State elections, upon or attached to which appear the names of Federal officers or employees, is a violation of section 11 of the Civil Service Act (now sec. 118 of the Criminal Code), which declares that no officer or employee of the Government shall be in any manner concerned in soliciting or receiving any assessment or contribution for any political purpose whatever from any officer or employee of the United States. The statute unquestionably condemns all such circulars, notwithstanding the particular form of words adopted, in order to show a request rather than a demand, and to give the responses a quasi-voluntary character.

39. **"Political assessments" defined.**—The following is an extract from the decision in *United States* v. *Scott* (74 Fed., 213), in the Circuit Court of the District of Kentucky, rendered October 7, 1895, by Taft, J.:

To charge a man with soliciting a contribution from United States officers for a political purpose carries with it by implication a charge that the accused knew the purpose for which the contribution was solicited. The words "for a political purpose" may reasonably be construed to qualify not only the contribution but the solicitation. Similarly, to charge that a man received from another his contribution for a political purpose, by implication charges that the reception was for the same purpose as the contribution. * * * Nor was it necessary to set out the specific averment that the defendant knew that the persons from whom the contributions were received were officers of the United States.

The following extract is from the decision rendered by McCall, J., in the case of *United States* v. *Dutro, L. W.*, 1913, Western District of Tennessee (unreported):

* The statute under which the indictment was found prohibits (and I shall speak of this concrete case) the postmaster at Memphis, Tenn., from receiving,

* Under section 8 of the act penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

or being in any manner concerned in receiving, any assessment, subscription, or contribution for any political purpose whatever from any official, clerk, or employee of the United States.

There are four counts in the indictment. Two of them charge the defendant with receiving subscriptions and contributions for political purposes from an officer, clerk, or employee of the United States, and two of them charge defendant with being concerned in receiving such assessment or subscription for political purposes from a clerk or employee of the United States.

Evidently one of the purposes of Congress in enacting the legislation was to prohibit superior officers from bringing pressure to bear upon their subordinates in order to secure contributions for campaign purposes, and the act is couched in very broad terms.

This evidence (which so far is uncontradicted) shows that the defendant, Mr. Dutro, did receive two contributions for campaign purposes from an officer or clerk or employee of the United States. Whatever may have been Mr. Dutro's frame of mind in regard to his connection with it, the one fact remains, as the evidence shows, that he received these contributions for the purposes and from the parties which the law prohibits. Perhaps and no doubt he did so without any thought that he was violating any statute, and felt that he was acting purely as a conveyor of these contributions to the political parties for whom they were intended, to accommodate those who were making the contributions, and purely as a personal matter, but I think under the evidence his action was in violation of the statute.

The other two counts, as I have pointed out, charge the defendant with being concerned in receiving assessments, subscriptions, or contributions for campaign purposes from a clerk, employee, or officer of the United States. There is a controversy here between counsel as to what the word "concerned" means. From what the law books say which have been read here, and from my own impression, it seems that the word "concerned" means to be interested in, or take part in, receiving such contributions. If Mr. Dutro, by his connection with these two subscriptions, took a part in the contributions being made by employees of the Government for campaign purposes, he would be guilty. I think the natural construction of the phrase or term or word necessarily leads to the conclusion that he did take a part in receiving the contributions, because he received and conveyed them from the contributors to the parties for whom they were intended, and, as the proof so far shows, he knew that the parties who were making the contributions were clerks under him in the Post Office Department, and he knew the purpose for which the money was to be used and where it was to go.

The foregoing case definitely establishes the principle that an employee of the Government who receives a political contribution from another such employee as a mere agent or messenger for the purpose of turning it over to a political organization commits a violation of the statute.

40. **Solicitation or receipt of political contribution in Federal buildings.**—The United States Code, title 18, section 209 (Criminal Code, sec. 119), provides that—

No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in section 208

of this title, or in any navy yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever.

41. **Letters addressed to Federal buildings.**—The Commission by a minute of March 23, 1897, held that addressing a letter to a Government employee in a Government building soliciting political contributions is a solicitation in that building within the meaning of section 12 of the Civil Service Act, but notwithstanding numerous violations no opportunity arose of having the question judicially determined until 1907, when an indictment was obtained against Edward S. Thayer at Dallas, Texas. A demurrer to the indictment was sustained on the ground that the act required the personal presence in the Government building of the solicitor. Appeal was taken to the Supreme Court, and the judgment of the lower court was reversed. (*United States* v. *Thayer*, 209 U. S. 39.) The opinion of the Court, delivered by Justice Holmes on March 9, 1908, establishes definitely the proposition that solicitation by letter or circular addressed to and delivered by mail or otherwise to an officer or employee of the United States at the office or building in which he is employed in the discharge of his official duties is a solicitation "in a room or building" within the meaning of this section, the solicitation taking place where the letter was received. (See also *United States* v. *Smith*, 163 Fed., 926, where the letter was personally delivered.)

42. **Letters delivered in Federal buildings.**—The Commission holds that the sending through the mails of letters to Government employees soliciting political contributions, their street or home address being omitted from the envelopes, with the result that the letters are delivered by the postal authorities in the Government building in which they are employed, constitutes a violation of this section. It is a maxim of the law that a person is presumed to intend the natural and probable consequences of his acts, and failure or omission to take measures to avoid delivery of such letters in a Government building will render the offender liable to prosecution.

43. **Discrimination on account of political contributions.**—The United States Code, title 18, section 210 (Criminal Code, sec. 120), provides as follows:

> No officer or employee of the United States mentioned in section 208 of this title shall discharge or promote or degrade or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

(See also sec. 52 herein.)

44. **Payment of political contributions by one employee to another.**—The United States Code, title 18, section 211 (Criminal Code, sec. 121), provides as follows:

> No officer, clerk, or other person in the service of the United States shall directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate

to Congress or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

45. **Penalties for assessments.**—The United States Code, title 18, section 212 (Criminal Code, sec. 122), provides that—

Whoever shall violate any provision of sections 208 to 211 of this title shall be fined not more than $5,000 or imprisoned not more than 3 years, or both.

46. **Foregoing offenses declared felonies.**—By section 15 of the Civil Service Act it was declared that persons violating any provisions of the four preceding sections should be guilty of a misdemeanor, but this section is now superseded by section 122 of the Criminal Code, above quoted, which makes such violation a felony in view of the following provision of section 335 of the Criminal Code (U. S. C., title 18, sec. 541):

All offenses which may be punished by death or imprisonment for a term exceeding 1 year shall be deemed felonies. All other offenses shall be deemed misdemeanors.

IX. PURCHASE AND SALE OF PUBLIC OFFICE

47. **Payment for influence in procuring appointive public office prohibited.**—The United States Code, title 18, section 149, provides as follows:

It shall be unlawful to pay or offer or promise to pay any sum of money, or any other thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence, whatsoever, to procure any appointive office under the Government of the United States for any person whatsoever.

48. **Receiving payment for influence in procuring appointive public office prohibited.**—The United States Code, title 18, section 150, provides as follows:

It shall be unlawful to solicit or receive from anyone, whatsoever, either as a political contribution, or for personal emolument, any sum of money or thing of value, whatsoever, in consideration of the promise of support, or use of influence, or for the support or influence of the payee, in behalf of the person paying the money, or any other person, in obtaining any appointive office under the Government of the United States.

49. **Punishment for violation.**—The United States Code, title 18, section 151, provides:

Anyone convicted of violating sections 149 and 150 of this title shall be punished by imprisonment of not more than 1 year, or by a fine of not more than $1,000, or by both such fine and imprisonment.

50. **Promising benefits for political activity.**—Section 3 of the act of August 2, 1939, 53 Stat. 1147, (U. S. Code, title 18, section 61b), reads:

It shall be unlawful for any person, directly or indirectly to promise any employment, position, work, compensation, or other benefit, provided for or made possible in whole or in part by any act of Congress, to any person as

consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in any election.*

X. POLITICAL COERCION

51. Section 2, clause second, of the Civil Service Act directs that the civil-service rules "shall provide and declare as nearly as the conditions of good administration will warrant, as follows: * * * Sixth. That no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." In pursuance of this section, civil-service rule I, section 1, provides, in part, that "No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof." This provision applies to all persons in the executive civil service, nonclassified as well as classified, and is held to prohibit a superior officer from requesting or requiring the rendition of any political service or the performance of political work of any sort by subordinates.

Section 1 of the act of August 2, 1939, 53 Stat. 1147 (U. S. Code, title 18, section 61), reads as follows:

That it shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives at any election held solely or in part for the purpose of selecting a President, a Vice President, a Presidential elector, or any Member of the Senate or any Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions.*

Section 7 of the act of August 2, 1939, 53 Stat. 1148 (U. S. Code, title 18, section 61f), reads:

No part of any appropriation made by any act, heretofore or hereafter enacted, making appropriations for work relief, relief, or otherwise to increase employment by providing loans and grants for public-works projects, shall be used for the purpose of, and no authority conferred by any such act upon any person shall be exercised or administered for the purpose of interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election.*

XI. POLITICAL DISCRIMINATION

52. Failure to contribute or render political service not prejudicial.—Section 2, clause second, of the Civil Service Act reads:

* Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

Fifth. That no person in the public service is for that reason under any obligations to contribute to any political fund or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Section 4 of the act of August 2, 1939, 53 Stat. 1147 (U. S. Code, title 18, section 61c), reads as follows:

It shall be unlawful for any person to deprive, attempt to deprive, or threaten to deprive, by any means, any person of any employment, position, work, compensation, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes, on account of race, creed, color, or any political activity, support of, or opposition to any candidate or any political party in any election."

53. No disclosure as to opinions or affiliations.—Section 2 of rule I provides as follows:

No disclosure or discriminations.—No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of any applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law.

54. Definition of discrimination.—Political discrimination consists in giving appointment, promotion, or any other favor to an appointee, eligible, or candidate because of his politics, or withholding appointment, promotion, or any other favor from an appointee, eligible, or candidate because of his politics. An appointing officer who appoints or refuses to appoint an applicant because the applicant does or does not entertain certain political opinions, who makes any inquiry of the applicant or any other person as to the applicant's political opinions or affiliations, or reduces an employee because that employee refuses to render political service, to be coerced in political action, or to contribute money for political purposes, or who advances or promotes an employee for opposite reasons, violates the Civil Service Act and rules.

XII. POLITICAL RECOMMENDATION

55. Senators and Representatives.—Section 10 of the Civil Service Act provides:

That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or Member of the House of Representatives, except as to the character or residence of the

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* Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

56. **Disclosing politics.**—Rule I, section 3, provides as follows:

No recommendation of an applicant, eligible, or employee in the classified service involving disclosure of his political or religious opinions or affiliations shall be considered or filed by the Civil Service Commission * * * or by any officer concerned in making appointments or promotions.

57. **Letters disclosing politics not to be considered.**—It is the duty of officers concerned in making appointments or promotions to refuse to receive or consider letters disclosing the politics or religion of an applicant, eligible, or employee and to explain to the writers that communications based upon such grounds will not receive attention or be filed.

58. **Recommendation for promotion.**—Rule XI, section 3, provides that—

No recommendation for promotion except in the regular form of periodical service-rating reports or unless it be made by the person or persons under whose supervision such employee has served shall be considered by any officer concerned in making promotions. Recommendation in any other form or by any other person, if made with the knowledge and consent of the employee, shall be sufficient cause for debarring him from the promotion proposed, and a repetition of the offense shall be sufficient cause for removing him from the service.

59. **Disclosure of names for political purposes.**—Section 6 of the act of August 2, 1939, 53 Stat. 1148 (U. S. Code, title 18, section 61e), reads:

It shall be unlawful for any person for political purposes to furnish or to disclose, or to aid or assist in furnishing or disclosing, any list or names of persons receiving compensation, employment, or benefits provided for or made possible by any act of Congress appropriating, or authorizing the appropriation of, funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager, and it shall be unlawful for any person to receive any such list or names for political purposes.[21]

[21] The penalty for violation of this section is a fine of not more than $1,000, imprisonment for not more than 1 year, or both.

EXHIBIT "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 24007

Filed Aug. 4, 1944. Charles E. Stewart, Clerk.

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), et al., *Plaintiffs,*

v.

HARRY B. MITCHELL, et al., *Defendants*

Before Groner, Chief Justice, United States Court of Appeals, District of Columbia; and Bailey and Morris, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court.

BAILEY, J.:

This is an action brought to declare invalid, as in contravention of the Constitution of the United States, the second sentence of Section 9 (a) of the Act of August 2, 1939, as amended, popularly known as the Hatch Act (U. S. C. 61 h (a); 53 Stat. 1147, 1148; 54 Stat. 767; 56 Stat. 181), and to enjoin the defendants, members of the United States Civil Service Commission "from enforcing, threatening to enforce, or otherwise acting" pursuant to that provision. Defendants have moved to dismiss the action and for summary judgment, the motion being accompanied by affidavit.

The following are the pertinent statutes and regulations:

Section 9(a) of the Hatch Act is as follows:

"It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No

officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term 'officer' or 'employee' shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Natioin-wde administration of Federal Laws."

Section 9 (b) of the Hatch Act is as follows:

"Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person."

Section 15 of the Hatch Act is as follows:

"The provisions of this subchapter which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on

the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns." (18 U.S.C. 610; 54 Stat. 767).

Section 18 of the Hatch Act is as follows:

"Nothing in the second sentence of section 9 (a) * * * shall be construed to prevent or prohibit any person subject to the provisions of this subchapter from engaging in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected, or (2) in connection with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party." (18 U.S.C. 61 r; 54 Stat. 767).

Revised Statutes Section 1753 (5 U.S.C. 631) contains the following provision:

"The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter * * * and may * * * establish regulations for the conduct of persons who may receive appointments in the civil service."

In the exercise of power conferred by R. S. Section 1753, and by the Civil Service Act, the President has promulgated

a number of Civil Service Rules. Civil Service Rule I is as follows:

> "No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinions on all political subjects, shall take no active part in political management or in political campaigns." (5 C.F.R. 1943 Cum. Supp., 1.1).

Civil Service Rule XV is as follows:

> "Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or Rules, or of any Executive Order or any regulation of the Commission, or that any employee subject thereto has violated such act, rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instruction of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing." (Executive Order No. 8705, March 5, 1941) (5 C.F.R. 1943 Cum. Supp., 15.1).

This action is brought by the United Federal Workers of America, an unincorporated labor union composed of employees of the United States Government, and 12 individual plaintiffs, each of whom occupies a position in the Federal government under the classified civil service. The defendants are the duly appointed and acting members of the United States Civil Service Commission.

The plaintiff union asserts that it has "an interest in protecting and restoring the rights of its membership" and that it brings this action "as a representative of, and on behalf of, all of its members, including those who have not specifically joined in suing individually, who are subject to the provisions of the second sentence of Section 9 (a) of the Hatch Act."

The plaintiffs charge that if they engage in the activities forbidden by Section 9 (a) of the Hatch Act the defendants will cause them to be dismissed; that plaintiff Poole has already conducted political activities in violation of said Section 9 (a), and that the defendants have already commenced proceedings for his dismissal from the employ of the United States.

The defendants contend that neither plaintiff union nor the individual plaintiffs can maintain this action; that it is not claimed that the union is prevented from engaging in any political activity; that a union does not stand in a position where it can assert the individual rights of its members; that the plaintiffs, other than Poole, have only hypothetical issues, and that they are not hurt because they have done nothing in violation of the Act.

Whether or not the union can maintain this action in a representative capacity the individual plaintiffs are in a different situation. The mere existence of the statute, saying that they shall not engage in political activity, the penalty in the statute that they shall be dismissed if they do, and the warning addressed to them by the Civil Service Commission in their posters certainly prevent them from engaging in such activity, if the statute is constitutional. If the statute is unconstitutional, they are being prevented from things which they have the right to do. If the statute is constitutional, it is mandatory that they be dismissed for doing such things. As to the plaintiff Poole, he has done the things denounced by the statute. If the Act is valid, dismissal is mandatory. There is no need for him to follow further administrative procedures. The provisions of Civil Service Rule XV that in case of any violation of the Civil Service Act or Rules or of any Executive Order or any regulation of the Commission the Commission shall certify

the facts to the proper appointing officer with specific instructions as to discipline or dismissal is now controlled by the provisions of the Hatch Act that in case of violation of Section 9 (a) of that Act, dismissal is mandatory.

We are of the opinion, therefore, that the individual plaintiffs have such an interest as to give them the right to maintain this suit.

The defendants further contend that the Civil Service Commission has no responsibility under the law to enforce the Hatch Act, and, therefore, no action can be maintained against them (except as to their own employees, of whom none are parties in this case) in which the constitutionality of the Hatch Act can be determined. It is true that the Hatch Act does not specifically charge the Civil Service Commission with the enforcement of the particular provision here involved. The situation is this: Revised Statutes, Section 1753 (5 U.S.C. 631) authorizes the President to prescribe regulations for the conduct of persons who may receive appointments in the Civil Service. Pursuant to that authority, Rule I, Section 1, was promulgated by Executive Order, providing, among other things:

> "Persons who by the provisions of these rules are in competitive classified service, while retaining the right to vote as they please and to express *privately* their opinions on all political subjects, shall take no active part in political management or in political campaigns."

By Rule XV, it is provided that, if the Commission finds that any person is holding a position in violation of the Civil Service Act, or the rules promulgated thereunder, or in violation of any Executive Order, or any regulations of the Commission, or that any employee subject to such act, rules, orders, or regulations is taking active part in political management or political campaigns, after notice to the person affected and opportunity for explanation, it shall certify the facts to the proper appointing officer with specific recommendation for *discipline or dismissal*. In the event of any continued violation for ten days after such recommendation, the Commission shall certify the facts to the

proper disbursing and auditing officers, and such officers shall not pay or allow the salary or wages of such person thereafter accruing.

The second sentence of the above-quoted Section 9 (a) of the Hatch Act provides:

> "No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material; shall take any active part in political management or in political campaigns."

It is this sentence which the plaintiffs claim to be unconstitutional.

It will be seen that the Congress here applies to all governmental employees, except those expressly excepted, the same rule of conduct respecting active participation in political campaigns and management as that which had theretofore applied only to Civil Service classified employees, with the exception that the word "privately" in the former Civil Service Rule was eliminated. It will also be observed that the penalty for such action is dismissal rather than as had theretofore in the Civil Service Rules been discipline or dismissal. It is significant that, after the enactment of the Hatch Act, the Civil Service Commission Rule I was altered to bring it into conformity with that Act by also eliminating the word "privately," and this was done, as stated in the Commission's brief, at page 15.

> "As a matter of fact, rather than Civil Service Rules I and XV being incorporated into the Hatch Act, the Hatch Act has compelled changes in the Rules."

It is true that there is no statement in the Hatch Act that Rule I of the Civil Service Commission is incorporated in Section 9 (a), but it is also true that the very words of that rule, with the exception of the word "privately," are the words of Section 9 (a). It has been recognized by the Ex-

ecutive Departments, pursuant to an opinion of the Attorney General, dated June 8, 1941, that by virtue of the Hatch Act the penalty for all employees, both classified and those not classified, is dismissal and not as theretofore provided respecting classified employees in Rule XV of the Civil Service Commission discipline or dismissal. It is argued by the Commission in its brief that the enforcement of the Hatch Act in this regard lies with the appointing authority having jurisdiction of the particular employee, namely, the head of a department or independent agency. This seems to be in accordance with the broad language in an opinion of the Attorney General, dated July 22, 1940 (39 Opinions of Attorney General 462). It will be noted that this opinion was prior to the Opinion of the Attorney General, first above referred to, and it will also be noted that there is no discussion of any difference of enforcement as to classified employees and those not classified.

Our conclusion is that the Congress moved into the field which had previously only been partially occupied by the rules of the Civil Service Commission, and which were applicable only to classified employees; that the Congress superseded the rules insofar as conduct is concerned, and made such rules applicable alike to both classified and unclassified employees; that Congress left the matter of enforcement of such rules of conduct where it found it, namely, that the Civil Service Commission, under rules of conduct which must be brought into accord with the Act of Congress, still retain the duty to enforce the proper penalty with respect to classified employees as they had theretofore had the power to do; and that the appointing authorities, namely, the heads of departments and independent agencies, who before the enactment of the Hatch Act were responsible for disciplinary measures, including dismissal, of employees not classified, remain charged with the duty of enforcement of such discipline, including dismissal, only they are required to apply the rules of conduct and disciplinary measures set forth in the Hatch Act. Viewed in this light, it seems clear that the Hatch Act, insofar as it is here involved, determines what the rules of the Civil Service Commission should be and what disciplinary penalties should be imposed upon a classified employee without

disturbing the existing authority of the Commission to visit such punishment upon a classified employee. If this be so, the individual plaintiffs in this cause and the Civil Service Commission have a very real concern and controversy as to the validity of the provisions of the Hatch Act here involved. We hold, therefore, that this suit is properly brought against the defendants.

Plaintiffs claim that the second sentence of Section 9 (a) of the Hatch Act is unconstitutional in that it violates fundamental rights of the plaintiffs guaranteed by the First Amendment to the Constitution, providing that "Congress shall make no law abridging * * * freedom of speech, or of the press, or of the right of the people peaceably to assemble" and that it deprives plaintiffs of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution, and that it disparages and denies to the plaintiffs fundamental right to engage in political activity reserved to the people by the Ninth and Tenth Amendments.

From the earliest times there have been certain restrictions respecting those who hold office or employment in the Government. President Jefferson in 1801 made the following order:

> The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State Governments. Freedom of elections being essential to the mutual independence of governments and of the different branches of the same government, so vitally cherished by most of our constitutions, it is deemed improper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right. This I am instructed, therefore, to notify to all officers within my Department holding their appointments under the authority of the President directly, and to desire them to notify to all subordinate to them. The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall

it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.

There has been a strong development toward safeguarding employees of the Government from insecurity attributable to political affiliation. While that has been accomplished to a much greater degree with respect to those occupying classified positions under the Civil Service, there is, nonetheless, a definite objective toward securing and keeping employees not in the classified service on the basis of merit rather than because of political activities on their part. As the Hatch Act has sought to extend to those latter much of the same protection theretofore afforded to classified employees, so it has imposed upon them the same restrictions heretofore recognized to be proper respecting classified employees. And in the instant discussion it is not to be lost sight of that the individual plaintiffs are all classified employees. The legislation hereunder consideration does not seek to take away from a Government employee his right to vote, nor his right to express his opinion on all political subjects. It does undertake to preclude him from taking any active part in political management, or in political campaigns, and by that is meant activities particularly defined by the Civil Service Commission (Section 15 of the Hatch Act). In the debates leading up to the passage of the Hatch Act much was said about the limitation on the constitutional rights of those employees who were made subject to the Act. Most that was said was by those who considered the legislation to be an infringement of such rights. There can, therefore, be no doubt that it was the considered judgment of the Congress and of the President that the legislation was not such an infringement.

To say that the Congress has not the power to pass this legislation in the public interest, and in the interest of the employees of the Government whose tenure it is seeking to protect, is to say that it is not rational for the Congress to conclude that it cannot take political activity out of the employment, promotion and dismissal of Government em-

ployees without at the same time taking Government employees out of political activity. This is a question for the Congress, and not the courts, to decide.

The plaintiffs challenge the legislation as being unreasonably discriminatory between the employees who come within the Act and certain employees excepted therefrom. First, the employees covered by the Act as compared with persons whose compensation is paid from appropriation for the office of the President, heads and assistant heads of Executive Departments, officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relation with foreign powers, or in the Nation-wide administration of Federal laws. It is perfectly obvious that these classes of employees are in very large measure political. No one supposes that they would not change with the changing of administrations. There is no need nor desire to protect them from political activity, and hence there is no corresponding occasion to restrict such activity on their part.

Section 18 of the Act provides that political activity shall not include certain elections where there are no candidates of a party whose electors have been voted for in a presidential election, nor an election in connection with any question which is not specifically identified with a national or state political party. Thus restriction is eliminated as to elections relating to constitutional amendments, referendums, approval of municipal ordinances and others of a similar character.

An amendment to the Act, which has application to certain state employees where the funds supporting the activity or institution with which they are connected are supplied in whole or in part by the Federal Government, exempts

> "any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the

United States; or by any recognized religious, philanthropic, or cultural organization."

It is clear that this exemption deals primarily with teachers, though no doubt other types of work come within such exempting provisions. To deny to Congress the power to make this classification is to say that the Congress may not rationally conclude that, while it should lay restrictions upon the political activity of Government employees generally, it should not do so where the duties of their work are such as to require acts which come within the general interdiction. Certainly the classification is not unreasonable viewed in the light of the objective of the legislation.

A further exemption by amendment relates to the participation of Federal employees residing in municipalities or other political subdivisions adjacent to the District of Columbia insofar as local campaigns and elections are concerned. The reasonableness of these classifications seem too obvious to require discussion to show that there is no arbitrary discrimination such as would invalidate the legislation.

All in all, we can see no sound reason for a conclusion that the second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution.

The motion of the defendants for summary judgment should be sustained and the complaint dismissed.

D. Lawrence Groner,
Jennings Bailey,
Jas. W. Morris,
U. S. Judges.